VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,	)	
	)	
v.	)	**Criminal No. K102888**
	)	
LEE BOYD MALVO,	)	
	)	
Defendant.	)	

NOTICE AND MOTION TO MAKE EX PARTE APPLICATIONS FOR EXPERT ASSISTANCE

PLEASE TAKE NOTICE that on the 6th day of February, 2003, at 9:00 a.m. in the aforesaid Court, Lee Boyd Malvo, by his counsel will move this court to enter an order allowing him to make EX PARTE APPLICATIONS FOR EXPERT ASSISTANCE to this Court.

WHEREFORE, Defendant respectfully moves this Honorable court to grant ex parte hearings on Defendant's motions for expert assistance. The grounds for this motion are set forth in the accompanying Memorandum of Law in Support.

Respectfully submitted,

Lee Boyd Malvo
By Counsel

MARTIN. ~~ARIF.~~ PETROVICH & WALSH

By:_____
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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO MAKE EX PARTE APPLICATIONS FOR EXPERT ASSSITANCE

LEE BOYD MALVO, the indigent Defendant in this action, has indicated through counsel his intention to present matters relating to the defense function by way of ex parte application to this Court. He has requested that such matters be considered ex parte and filed under seal. Lee Boyd Malvo submits this Memorandum to demonstrate that ex parte proceedings on these matters are essential to protect his rights to present a defense, to the effective assistance of counsel, to compulsory process to secure witnesses, to confront the evidence against him, to due process, to equal protection of the laws, to freedom from cruel and unusual punishment, and against compulsory self-incrimination, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, sections 8, 9 and 11 of article I of the Virginia Constitution, and Va. Code Ann. §§19.2-264.3:1, 19.2-268, 19.2-270, 19.2-330, and 19.2-334.

It is well established that certain parts of the criminal process are carried out ex parte. For example, neither Lee Boyd Malvo nor his counsel was summoned to the grand jury when

the prosecution was presenting its case for indictment. They were not invited to hear the testimony, cross-examine any of the witnesses, or make any statements to assist the grand jurors in their deliberations. To this day, the proceedings before the grand jury remain a secret. Nor has Lee Boyd Malvo or his counsel been given notice of or asked to help the prosecution determine which investigators to use or what experts to employ in the prosecution of the case against him. Similarly, an application for an arrest or search warrant is usually presented to a judicial officer in ex parte proceedings.

It is well established that ex parte proceedings relating to the defense function are equally essential to protect a number of important constitutional rights of an indigent accused as well as other vital interests of the criminal justice system. This Memorandum reviews the circumstances, principles, and precedents that require ex parte applications and proceedings.

EX PARTE PROCEEDINGS ARE INDISPENSABLE TO THE PROPER FUNCTIONING OF THE ADVERSARY SYSTEM AND TO PROTECT THE RIGHTS OF LEE BOYD MALVO

It is well established that, when a state brings its judicial power to bear on an indigent Defendant in a criminal case, the State must provide such defendant "with the 'basic tools of an adequate defense. Britt v. North Carolina, 404 U.S. 226, 227 (1971).'" O'Dell v. Commonwealth, 234 Va. 672, 686, 364 S.E.2d 491, 499 (1988); Husske v. Commonwealth, 252 Va. 203, S.E.2d (1996). Further, in Ake v. Oklahoma, 470 U.S. 68, 86-87 (1985), the United States Supreme Court held that where the assistance of an expert is needed to prepare or present a defense, an indigent defendant has a constitutional right to the services of an independent expert at state expense.

> [When a] question . . . [is] likely to be a significant factor in his defense . . . [the defendant is] entitled to the assistance of a[n

> expert] on this issue and denial of that assistance deprive[s] him of due process.

Ake involved the denial of an independent psychiatrist in a capital case which presented issues of insanity and future dangerousness. In analyzing under what circumstances expert assistance is constitutionally required, the Court stated:

> When the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent . . . . [T]he State must [then], at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 82-83 (emphasis added). See also United States v. Roman, 121 F.3d 136, 143 (3d Cir. 1997) (noting that the federal system provides for "investigative, expert, or other services necessary for adequate representation . . . in an ex parte application"); McGregor v. State. 754 P.2d 1216, 1217 (Okla. Crim. App. 1988) (intention of Ake majority that hearings be held ex parte is manifest); Thomason v. State, 268 Ga. 298, 309, 486 S.E.2d 861, 871 (1997).

The Ake decision applies to all services reasonably necessary for an effective defense. See, e.g., Husske v. Commonwealth, 252 Va. 203, 476 S.E.2d 920 (1996); United States v. Patterson, 724 F.2d 1128 (5th Cir. 1984) (fingerprint specialist); Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975) (firearms expert); Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980) (pathologist); United States v. Fogarty, 558 F. Supp. 856 (E.D. Tenn. 1982) (handwriting analyst); Brown v. Eyman, 324 F. Supp. 339 (D. Ariz. 1970) (serologist). See also Thorton v. State, 339 S.E.2d 241 (Ga. 1986) (dental expert); Patterson v. State, 232 S.E.2d 233 (Ga. 1977) (narcotics analyst).

The Supreme Court's decision in Ake was based on its recognition that to deny an indigent accused basic, critical expertise while the State has unfettered access to any expert of its choosing would render a criminal trial fundamentally unfair. The truth finding function of the adversary process would also be lost if the prosecution were allowed simply to overwhelm the impoverished defendant with the wealth of its resources:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense . . . . [This Court] has often reaffirmed that fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system.

470 U.S. at 77 (quoting Ross v. Moffitt, 417 U.S. 600, 612, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974)). Due process and fundamental fairness thus forbid the state from "legitimately assert[ing] an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cas a pall on the accuracy of the verdict obtained." Ake, 470 U.S. at 79; Husske v. Commonwealth, 252 Va. 203, 476 S.E.2d 920 (1996).

These same interests, which require the State to bear the expense of services essential to the defense, also require that applications for those services be considered ex parte. The Commonwealth's Attorney should have no more voice in determining whether the Defendant has the "raw materials" integral to an effective defense, than Lee Boyd Malvo should have a voice in determining what police officers investigate his case or what State experts analyze his fingerprints or handwriting.

Nor does fundamental fairness tolerate requiring only the indigent Defendant to

disclose, on account of his poverty, the lines of investigation he is undertaking, the names of those he is consulting in preparing his case, and other confidential matters. The confidential decisions of client and counsel are among the "basic tools of an adequate defense" that must not be abridged due to the indigency of the Defendant. Ake, 470 U.S. at 77 (quoting Britt v. North Carolina, 404 U.S. 226, 227, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971)). Involving the prosecution in the consideration of such sensitive defense matters would merely enhance the "strategic advantage" the Ake ruling was meant to minimize.

The following sections demonstrate that because of the showing which a defendant is required to make under Ake and because of the nature of the services sought, disclosure to the prosecution would be prejudicial to the defense and thus requires ex parte consideration.

I. APPLICATIONS FOR DEFENSE EXPENSES MUST BE EX PARTE BECAUSE OF THE SHOWING REQUIRED

Ake provides that an indigent defendant is entitled to defense services at state expense only upon a threshold showing that such assistance is required to deal with a significant factor in the defense of the case. Ake, 470 U.S. at 86-87. See also Caldwell v. Mississippi, 472 U.S. 320, 323 n.1, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) (defendant must support request for investigator and fingerprint and ballistics experts with something more than general statement of need). In order to demonstrate his entitlement to an expert or investigator assistance, the Defendant must reveal to the Court the theory of the defense, the results of any investigation and witness consultation that has already taken place and other work product, and the information that is anticipated from the services sought. Of necessity, this showing requires disclosure of information obtained in attorney-client interviews.

To require indigent defendants to reveal this information to the prosecution

compromises their right to present a defense. See Blazo v. Superior Ct., 315 N.E.2d 857, 860 n.8 (Mass. 1974) ("The reason ex parte application is allowed is that, just as a defendant who is able to foot the costs need not explain to anyone his reasons for summoning a given witness, so an impecunious defendant should be able to summon his witnesses without explanation that will reach the adversary.")

In federal prosecutions, a defendant is protected by express statutory provisions in the Criminal Justice Act which require that an indigent's request for expert assistance be considered ex parte. 18 U.S.C. 3006A(e); Fed. R. Crim. P. 17(b). See also H.R. Rep. No. 864, 88th Cong., 2d Sess. (1963), reprinted in 2 U.S. Code Cong. & Ad. News 2990 (1964) (Criminal Justice Act's ex parte procedure "prevents the possibility that an open hearing may cause a defendant to reveal his defense."); S. Rep. No. 346, 88th Cong., 1st Sess. 3 (1963) (ex parte requirement included in Criminal Justice Act "in order to protect the accused from premature disclosure of his case.") Judicial interpretations of the ex parte requirement have made clear that its function is to protect the accused from having to make premature disclosure of confidential information to the State.

For example, in United States v. Sutton, 464 F.2d 552 (5th Cir. 1972), the defendant's conviction was reversed due to the trial court's failure to hold an ex parte hearing on his motion for an investigator. The reviewing court agreed that the defendant should not have had to reveal the names of his potential witnesses or the type of information sought by the investigation and thereby unveil his case to the prosecution. Id. at 553. The Court, in Marshall v. United States, 423 F.2d 1315, 1318 (10th Cir. 1970), similarly overturned a conviction when the accused was subject to an adversarial rather than ex parte hearing on his need for investigative aid, observing that "the manifest purpose of requiring that the inquiry be

ex parte is to insure that the defendant will not have to make a premature disclosure of his case."

As stated by the United States Court of Appeals for the Fifth Circuit, the proceeding must be held ex parte because "[d]issemination of information critical to the defense permits the government to enjoy unauthorized discovery which is forbidden under our concept of criminal procedure." United States v. Edwards, 488 F.2d 1154, 1162 (5th Cir. 1974). See also United States v. Greschner, 802 F.2d 373, 379-80 (10th Cir. 1986), cert. denied, 480 U.S. 908, 107 S. Ct. 1353, 94 L. Ed. 2d 523 (1987) (although waived by defense, Court of Appeals notes on its own motion that it was error for trial court to allow government attorneys to attend hearing on application for penologist, pathologist, bloodtests, and subpoenas at which defendants were required to disclose their theory of self-defense in support of their applications); United States v. Meriwether, 486 F.2d 498, 506 (5th Cir. 1973) (intent of ex parte provision is to shield theory of defense from prosecutor's scrutiny); Williams v. United States, 310 A.2d 244 (D.C. App. 1973) (purpose of ex parte hearing is to ensure that defendant need not make premature disclosure of case in order to obtain access to expert services); Gaither v. United States, 391 A.2d 1364, 1367 n.4 (D.C. App. 1978) (eligibility and need for defense services must be determined in ex parte proceeding to afford accused opportunity to present request without prematurely disclosing merits of defense to prosecution).

The same considerations apply with equal force to this capital prosecution. To require Lee Boyd Malvo to disclose the nature of his defense, the names of persons with whom he seeks to consult, and the purposes for which he seeks such assistance would compromise his right to present a defense and to prepare his case in confidence with counsel in violation of the

principles of law cited in the opening paragraph of his memorandum.

II. APPLICATIONS FOR DEFENSE EXPENSES MUST BE EX PARTE BECAUSE OF THE NATURE OF THE SERVICE REQUESTED

An indigent defendant who petitions the Court for investigative or other needed assistance is not necessarily seeking "neutral" input as might be imagined in an inquisitional, as opposed to adversary, system of justice. Instead, the indigent person accused of a crime seeks the same type of assistance that any person means would employ–someone in whom he has trust and with whom he can work in confidence in analyzing the prosecution's case against him and planning a defense to.

As the Supreme Court observed in Ake,

> the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder or behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, Solesbee v. Balkcom, 339 U.S. 9, 12 (1950), and tell the jury why their observations are relevant.

470 U.S. at 80, 105 S. Ct. AT 1095-96, 84 L. Ed. 2d (1985). See also United States v. Fessel, 781 F.2d 826, 834 (10th Cir. 1986) (services of expert appointed in ex parte proceeding include those necessary for cross examination of government witnesses as well as presentation of defense expertise).

"Just as an indigent defendant has a right to appointed counsel to serve him as a loyal

advocate he has a similar right under properly proven circumstances to investigative aid that will serve him unfettered by an inescapable conflict of interest." United States v. Marshall, 423 F. 2d 1315, 1319 (10th Cir. 1970) (error to deny ex parte hearing on need for investigative assistance, and appointment of F.B.I. agent cannot suffice to satisfy request).

These objectives would be compromised if the Commonwealth were allowed to oppose certain defense services or to influence which investigators or experts were retained by the defense. See, e.g., United States v. Chavis, 476 F.2d 1137, 1141-45 (D.C. Cir.), aff'd. on rehearing, 486 F.2d 1290 (D.C. Cir. 1973) (federal statute contemplates assistance of expert in presenting defense; attendance and participation of prosecutor in hearing on request constitutes error); Gaither v. United States, 391 A.2d 1364, 1367, 1368 (D.C. App. 1978) (presence of government counsel during proceeding on request for funds error; very purpose of appointment is to provide expert services necessary to adequate defense). See also United States v. Hamlet, 456 F.2d 1285 (5th Cir. 1972), (denial of ex parte inquiry into need for defense psychiatrist error, where only examination was conducted by government expert, not expert whose responsibility is to assist defense). Thus, it would be error for this Court to give the Commonwealth a voice in deciding whether Lee Boyd Malvo was entitled to certain investigators or expert witnesses.

III. APPLICATIONS FOR DEFENSE EXPENSES MUST BE EX PARTE TO PROTECT RIGHT TO EQUAL PROTECTION AND DUE PROCESS

It is well established that the kind of trial a criminal defendant receives must not depend on the amount of money he has. Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956). In recognition of this fundamental principle, the Supreme Court has repeatedly upheld the right of indigents to receive basic defense tools at state expense. Id.

(right to trial transcript); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (right to trial counsel); Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963) (right to counsel on appeal); Roberts v. Lavallee, 389 U.S. 40, 88 S. Ct. 194, 19 L. Ed. 2d 41 (1967) (right to transcript of preliminary hearing); Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) (right to counsel for misdemeanor). The Ake decision is only one in a long line of cases defining the due process rights of the indigent accused.

There is no question that were Lee Boyd Malvo financially independent he would obtain investigative and other services without informing the prosecution of whose assistance he was seeking or why. The very purpose of providing funds for such assistance is to place the indigent defendant as nearly as possible on a level of equality with the nonindigent. Chambers v. Florida, 309 U.S. 227, 241, 60 S. Ct. 472, 479, 84 L. Ed. 2d 716 (1994) ("basic principle that all people must stand on an equality before the bar of justice in every American court"); United States v. Tate, 419 F.2d 131, 132 (6th Cir. 1969); United States v. Theriault, 440 F.2d 713, 716 (5th Cir. 1973) (Wisdom, J., concurring). Penalizing impoverished defendants by requiring them to disclose privileged information and their trial strategy as a prerequisite to investigating and presenting a defense would constitute invidious discrimination. See State v. Hamilton, 448 So. 2d 1007, 1008-09 (Fla. 1984) (rule allowing appointment of expert designed to give indigent defendant same protection as solvent; no solvent defendant would be subjected to adversary proceeding or inquiry into basis of need for assistance).

> When an indigent defendant's case is subjected to pre-trial scrutiny by the prosecutor, while the monied defendant is able to proceed without such scrutiny, serious equal protection questions are

raised.

United States v. Meriwether, 486 F.2d 498 (5th Cir. 1973), cert. denied, 417 U.S. 948 (1974). As stated by the Court of Appeals for the First Circuit:

> We are not impressed by one government's contention that it could properly attend the "ex parte" presentation so long as it did not take an active part. Rather, we would regard the purpose of the . . . rule as apparent on its face to be in recognition of the principle that defendants are not to be avoidably discriminated against because of their indigency. Discovery, though only partial, would clearly be a discrimination.

United States v. Holden, 393 F.2d 276 (1st Cir. 1968) (citations omitted).

Therefore, denial of the right to proceed ex parte would deprive Lee Boyd Malvo of equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the United States Constitution and sections 8 and 11 of article I of the Virginia Constitution.

IV. APPLICATIONS FOR DEFENSE EXPENSES MUST BE EXPARTE TO PROTECT RIGHT TO COUNSEL

In order to provide effective assistance an attorney must adequately investigate and prepare his or her client's case. Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) (at heart of effective representation is independent duty to investigate and prepare); see also McQueen v. Swenson, 498 F.2d 207, 217 (8th Cir. 1974) (attorney who does not seek out all facts relevant to client's case will not be prepared at trial). Where investigative and other services are necessary to the preparation and presentation of an adequate defense, the denial of access to those services may also deprive a defendant of the minimally effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments. Blake v. Kemp, 758 F.2d 523, 531 (11th Cir. 1985); Pedrero v. Wainwright, 590 F.2d 1383, 1396 (5th Cir. 1979); United

States v. Fessel, 531 F.2d 1275 (5th Cir. 1976). See also Mason v. Arizona, 504 F.2d 1345, 1352 (9th Cir. 1974), cert. denied, 420 U.S. 9936, 95 S. Ct. 1145, 43 L. Ed. 2d 412 (1975) (failure to provide investigative assistance when necessary to defense constitutes ineffective performance). Furthermore, appointment of an incompetent investigator "could constitute a violation of the defendant's Sixth Amendment right to effective assistance of counsel." Stubbs v. Thomas, 590 F. Supp. 94, 100 (S.D.N.Y. 1984).

Counsel cannot be prepared to rebut the State's evidence without meaningful consultation with experts for the defense. Nor can counsel appropriately investigate aspects of their client's case without the type of assistance that any attorney would obtain for a financially able defendant. See, e.g., United States v. Theriault, 440 F.2d 713, 716-17 (5th Cir. 1971) (Wisdom, J., concurring), cert. denied, 411 U.S. 984, 93 S. Ct. 2278, 36 L. Ed. 2d 960 (1973).

The failure to allow ex parte applications for assistance would invariably deprive Lee Boyd Malvo of the benefit of his counsel. Counsel will be forced either to forgo an application for assistance in order to keep attorney-client communications, work product, and trial strategy confidential or make the needed request, thereby breaching his duty of confidentially and prematurely revealing matters no competent attorney would disclose before trial. An ex parte procedure obviates the need for such an untenable choice.

V. APPLICATIONS FOR DEFENSE EXPENSES MUST BE EX PARTE TO PROTECT THE RIGHT AGAINST SELF-INCRIMINATION

Ex parte proceedings on the need for defense assistance are necessary to protect Lee Boyd Malvo's right against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution, and section 8 of article I of the Virginia Constitution. The

privilege against self-incrimination is secured only when a criminal defendant has the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." Estelle v. Smith, 451 U.S. 454, 468, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), quoting Malloy v. Hogan, 378 U.S. 1, 8, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). If Lee Boyd Malvo or his attorney is compelled to disclose confidential facts in order to obtain financial assistance, the defendant surely cannot be said to have exercised his own will. Nor can the failure to justify the request for aid be deemed anything but a penalty for silence.

This was made abundantly clear in Marshall v. United States, 423 F.2d 1315 (10th Cir. 1970). The defendant in that case was compelled to justify his need for investigative assistance before the prosecuting attorney. As a result, the State was able to locate a witness of whom it had previously been unaware who then testified against the defendant. In reversing the conviction, the Court emphasized: "Certainly the movant cannot be said to 'waive' disclosure of his case and his con-comitant rights against self-incrimination and to due process by [requesting services] . . . . [That request cannot] be used . . . as a means of frustrating the fifth amendment right prohibiting self-incrimination." Id. at 1318-19.

VI. THE TRIAL JUDGE HAS DISCRETION TO GRANT EX PARTE HEARINGS ON MOTIONS FOR EXPERT ASSISTANCE

The Supreme Court of Virginia has not yet recognized the Ake constitutional requirement of an ex parte hearing. In Ramdass v. Commonwealth, 246 Va. 413, 437 S.E.2d 566 (1993), the Supreme Court of Virginia relied on a prior holding purportedly stating that there was no constitutional right to an ex parte hearing. Id. at 422, 437 S.E.2d at 571 (citing O'Dell v. Commonwealth, 234 Va. 672, 686, 364 S.E.2d 491, 499 (1988)). However, in

O'Dell, the court's holding did not address the issue of an accused's constitutional right to ex parte hearings:

> O'Dell claims he was entitled to an ex parte hearing on the necessity of the Commonwealth's funding of experts to assist him in his defense. O'Dell admits none of the proposed experts would address the question of his sanity, as in Ake v. Oklahoma, 470 U.S. 68 (1985); they were all forensic scientists. O'Dell had no constituional right requiring the Commonwealth to provide funding for this type of expert assistance.

O'Dell, 234 Va. at 686, 364 S.E.2d at 499 (internal citations omitted). Obviously, Ramdass misinterpreted the holding in O'Dell. Quite clearly, the court did not reject O'Dell's claim of a constitutional right to an ex parte hearing; rather it rejected his claim because the experts he sought were not Ake mental health experts. Because the O'Dell court ruled that there was no constitutional right to funding of non-psychiatric experts, whether an ex parte hearing was required was not even considered, much less decided. Therefore, the Ramdass court erred in relying on O'Dell as having settled that issue.

Further more, O'Dell was rejected in Husske v. Commonwealth, 252 Va. 203, 476 S.E.2d 920 (1996). Husske stated that "an indigent defendant who seeks the appointment of an expert, at the Commonwealth's expense, must show a particularized need for such services and that he will be prejudiced by the lack of expert assistance." Id. at 213. Husske relied on Ake for its holding and this reliance implies ex parte hearings. Or, even if it does not, there is absolutely nothing in Husske limiting the trial judge's discretion to hold ex parte hearings. This court should exercise its discretion to permit ex parte hearings.

The defendant's burden to demonstrate a "particularized need" for expert services necessitates disclosing trial strategy and defense theories of the case, information which is privileged against disclosure to the prosecution. Lee Boyd Malvo cannot be called on to

sacrifice one set of constitutional rights in order to receive the benefit of another. His motions for the "raw materials integral" to his defense must be considered ex parte.

Respectfully Submitted,

Lee Boyd Malvo
By Counsel
MARTIN, ARIF, PETROVICH & WALSH

Bv: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT true and accurate copies of the foregoing Notice and Motion, and accompanying Memorandum, were hand-delivered to Robert F. Horan, Esq., Commonwealth's Attorney this 5th day of February, 2003.

Michael S. Arif